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In the Supreme Court of the United States

October Term 1946

No. 540

Nelson Foster and George Payne,
Petitioners,

v.

The People of the State of Illinois,
Respondent.

On writ of certiorari to the Supreme Court of the State of Illinois.

BRIEF FOR THE STATE OF MICHIGAN, AS AMICUS CURIAE.

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Brief for the State of Michigan, as Amicus Curiae. [*]

I

Statement of the Case.

The decision to file a brief in this cause was influenced somewhat, though not entirely, by our apprehension that a further judicial step toward adoption of an unqualified rule (*viz.*, that due process is denied by a State whenever it permits a layman, regardless of age, mentality, or ability to make a competent choice, to plead guilty without the advice of counsel), [1] would lead inevitably to

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[*] In filing this brief, we exercise the privilege of Revised Rule 27, § 9.

[1] The Court has refused, so far, to hold that 'the Constitution unqualifiedly deems an accused incompetent unless he does have the advice of counsel'. Adams v. United States, ex rel. McCann, 317 U.S. 269, at 277.

a jail delivery of hundreds of prisoners whose release might endanger the welfare of organized society; for as we view the problem, the firm establishment of such a broad rule could only result in freeing numerous criminals of a desperate type who many years ago pleaded guilty without entertaining the slightest notion that they were in need of counsel (cases in which all witnesses have disappeared). [2]

We accept respondent's statement of the case and counsel's version of the questions presented; and we are in full accord with the views expressed by the Attorney General of Illinois.

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[2]

To us the important question is whether Michigan courts are obligated to go much beyond the doctrine reasserted in De Meerleer v. Michigan, 329 U.S. ——; 67 Sup. Ct. 596. See also Willey v. Hudspeth (March 8, 1947), 178 P. 2d 246, a Kansas case involving a 17-year old boy.

II

Argument.

Point One

Federal due process does not imply a categorial right to counsel in non-capital cases. Special circumstances, such as a more than ordinarily complex case or a less than ordinarily understanding accused, must exist in order to warrant invocation of the Fourteenth Amendment.

Apt and incisive language of the Court in the case of *Adams,* [3] lends further color to the convincing argument of the Attorney General of Illinois:

> "The task of judging the competence of a particular accused cannot be escaped by announcing delusively simple rules of trial procedure which judges must mechanically follow. The question in each case is whether the accused was competent to exercise an intelligent, informed judgment—and for determination of this question it is of course relevant whether he had the advice of counsel. *But it is quite another matter to suggest that the Constitution unqualifiedly deems an accused incompetent unless he does have the advice of counsel.*" [Emphasis added].

Counsel for the State of Illinois have through exhaustive and painstaking research prepared and published as an appendix to their brief (pp. 20-46), a study of the right

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[3] Counsel for petitioners relies upon this case, and the Attorney General of Illinois quotes from another part of the opinion. Adams v. United States ex rel. McCann, 317 U.S. 269, at 276-277.

to counsel in state criminal cases (a continuation of this Court's work in *Betts v. Brady*, 316 U.S. 455, 477-480).

From this valuable little treatise, we learn that decisions of courts of last resort in the majority of states hold or state (1) that a failure to request counsel operates as a waiver of the right to counsel, [4] or (2) that there is a waiver of the right to counsel where the defendant pleads guilty to a non-capital offense and fails to request counsel. [5] And the Attorney General sets forth his collation of constitutional and statutory provisions of the various states relating to right of counsel (brief, pp. 22-46).

Michigan's Constitution, article 2, § 19, guarantees that 'in every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his defense', and that declaration is not a recent innovation in our fundamental law.

> "In practically identical language it was a part of the first Michigan State Constitution (1835), art. 1, § 10, and was carried down into the Constitution of 1908 through article 6, § 28, of the Michigan Constitution of 1850. Also, before Michigan became a State, the right of an accused person to have counsel

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[4] Prior to De Meerleer, supra, decisions of the Michigan supreme court, even in murder cases, People v. Crandell, 270 Mich. 124, fell within this category; but the court has not perforce De Meerleer, felt called upon to overrule People v. Harris, 286 Mich. 317, where forgery was charged, or In re Elliott, 315 Mich. 662, where robbery while armed was involved. See also, People v. Haddad, 306 Mich. 556.

[5] Citing: People v. Fries, 294 Mich. 382, involving plea of guilty to charge of carrying concealed weapons.

was recognized by the territorial laws applicable to this territory, adopted by the governor and judges of the Territory of Michigan." [6]

The legislature of this State has fortified the constitutional guarantee by a statutory declaration, [7] and it has provided for the appointment of 'some attorney to conduct the defense', at county expense, 'whenever any person charged with having committed any felony or misdemeanor shall be unable to procure counsel'. [8]

'Thus', as the Attorney General of Illinois so clearly notes, 'the courts of at least one-half of the states of the Union have not regarded the right to counsel, at least in non-capital cases where there is an acknowledgment of guilt in open court, as implicit in the concept of due process of law'.

And we also agree with him when he says:

"This case cannot be reversed on the common-law record alone unless this Court is prepared to hold that in *every* serious criminal case, the trial court must appoint counsel for the accused before receiving a

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[6]

The court through Mr. Justice Boyles, In re Elliott, 315 Mich. 662, at 666, citing inter alia 1 Michigan Territorial Laws, p. 595, § 22 of 'An Act regulating proceedings in criminal cases', enacted by the governor and judges, May 11, 1820.

[7]

Mich. Code of Criminal Procedure, chap. 37, § 1 (3 Comp. Laws Mich. 1929, § 17129 [Mich. Stat Ann. § 28.854]).

[8]

Idem., chap. 15, § 16 (3 Comp. Laws Mich. 1929, § 17486 [Mich. Stat. Ann. § 28.1253]).

plea of guilty or to recite affirmatively a waiver of the right'' (brief, p. 9).

Respondent's counsel then point out dire results which might follow this Court's declaration of such a principle (brief, pp. 9-10), and, while we agree, we desire to speak more particularly of the conditions that could in such an event arise in our own State.

While Michigan has for well over a century preserved the right to counsel for the purpose of defense, she has never, in ordinary or, what for lack of a better term might be called 'mine-run' criminal cases, where extraordinary circumstances are absent, considered it necessary to furnish counsel for an accused person unless requested. Indeed, it would be extremely difficult to persuade a Michigan *nisi prius* judge to accept the idea that counsel should be tendered an accused person of mature years, of more than average intelligence, and of sufficient mentality to know that he has committed an act proscribed by state law (such as larceny, robbery, burglary, or robbery), who comes voluntarily into open court without coercion or intimidation of any kind, and expresses a desire to plead guilty to an uncomplicated charge. Much less could he grasp the thought that such a criminal should be given his freedom some 15 years after pleading guilty, and after the witnesses are dead, or have otherwise vanished. [9]

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[9]

This does not mean that Michigan judges have not accepted the De Meerleer doctrine, for several new trials have been granted on that authority, but it does mean that judicial officers of this State are deeply concerned lest that principle be carried so far that it will reach all criminals incarcerated in this state without having first sought counsel before pleading guilty.

The Attorney General of Illinois draws a clear line of demarcation between the non-capital cases on which petitioners rely, [10] and the case at bar, and, while we need not repeat what he has said so well, we take the liberty of noting the distinctive features of the case of *De Meerleer, supra.*

In *De Meerleer,* a 17-year old boy, accused of murder, was held in communicado for several days. He was then taken before a magistrate to waive preliminary examination, and rushed into the trial court where, within a few hours, without the advice of counsel or a chance to obtain a lawyer, he pleaded guilty, was accorded a unilateral hearing to determine the degree of the crime, without opportunity to cross-examine the State's witnesses, to produce witnesses of his own, or to testify in his own behalf, and he was sentenced to imprisonment for life (although his father was present in the court room and protested). Moreover, the record did not disclose that the defendant's plea was unequivocal; and his conduct in open court on arraignment was that of a bewildered youth who could not comprehend the fine distinctions between first and second degree murder. [11]

The supreme court of Kansas, in a recent case, [12] set aside a conviction on a plea of guilty entered by a 17-year old boy in circumstances closely paralleling *De Meer-*

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[10]

House v. Mayo, 324 U.S. 42; Rice v. Olson, 324 U.S. 786; Canizio v. New York, 327 U.S. 82.

[11]

Mich. Penal Code, § 316 (5 Comp. Laws Mich., 1940 Cum. Supp., § 17115-316 [Mich. Stat. Ann. § 28.548]).

[12]

Willey v. Hudspeth (Kans., March 7, 1947), 178 P 2d 246.

leer, but they went even further than this Court in the case of *De Meerleer*, holding (1) that a 17-year old boy ordinarily is not possessed of sufficient comprehension of his constitutional rights in a criminal case in which he is charged with the commission of a felony to waive advice of counsel and should be given the benefit of consultation with counsel before he is permitted to enter a plea of guilty; and (2) that the failure of the trial court to require petitioner to consult with counsel caused the trial court to lose jurisdiction to accept the plea of guilty and the sentence imposed thereon, therefore, was void.

In the case at bar, however, outside a few extrajudicial assertions in petitioners' assignments of error, the record discloses no circumstances of the extraordinary nature found in the case of *De Meerleer* or in the Kansas decision just noted.

Point Two

Even if due process required the appointment of counsel in this case unless the accused chose to dispense therewith, the case could not be reversed on the common-law record on writ of error. Other remedies, original and not appellate in office and nature, are available in Illinois for the assertion of any rights that petitioners may have or claim.

We agree, of course, that the Attorney General of Illinois is absolutely correct in stating that under the laws of his State, petitioners' remedy is to present a simple motion to the trial court suggesting facts and circumstances that demonstrate, or at least raise a fair inference, of denial of due process. Such questions cannot be raised on a direct appeal from a naked common-law record.

This is in close harmony with Michigan law, for in this State the recognized procedure is to file a motion for leave to file a delayed motion for new trial, setting forth facts dehors the formal trial court record of calendar and journal entries. [13] And it should also be stated that in Michigan, *habeas corpus* is not deemed the appropriate remedy. [14]

Michigan realizes that only in her trial courts can adequate facilities be found to resolve those issues of fact which are bound to arise in a case of this type. [15]

Point Three

The record fails to show or to support a fair inference that the prisoners had 'special need for advice of counsel because of the difficult legal questions involved' or were 'unconstitutionally rushed through trial'.

The Attorney General of Illinois is far more competent than is the writer of this brief to comment upon the common-law record in this case; indeed, it would be extremely presumptuous on our part to undertake such a task.

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[13]

People v. Burnstein, 261 Mich. 534. And the procedure was followed in De Meerleer.

[14]

In re Palm, 255 Mich. 632; In re Brasel, 283 Mich. 632; In re Stone, 295 Mich. 207; In re Dunning, 310 Mich. 1.

[15]

We might add it is the policy of this department, whenever a problem of this nature arises, to conduct a thorough investigation in the trial court and, if constitutional rights have been violated, suggest that a new trial be granted.

It is our thought, however, that this naked common-law record fails to reveal any special circumstances entitling the petitioners to consideration, that the cases cited by the respondent's counsel control, and that *Carter v Illinois*, 329 U.S. 173, applies.

III

Conclusion.

For the reasons developed in the brief of the Attorney General of Illinois, it is submitted that the judgment of the Supreme Court of that State should be affirmed.

Respectfully submitted,

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